LOEB&LOEB LLP

A LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

10100 SANTA MONICA BOULEVARD
SUITE 2200
LOS ANGELES, CA 90067-4164

TELEPHONE: 310.282.2000
FACSIMILE: 310.282.2200
www.loeb.com

Direct Dial: 310-282-2228
e-mail: acohen@loeb.com

August 18, 2004

VIA FACSIMILE & U.S. MAIL

Allyn Stern
Acting Branch Chief
Office of Regional Counsel
Hazardous Waste Branch

Re: Revised Omega *De Minimis* Settlement Offer

Dear Ms. Stern:

The Omega *De Minimis* Group (the "Group") is in receipt of your letter dated August 11, 2004. Despite the fact that many of our Group members are small businesses and all Group members legally sent their wastes to the Omega Site for disposal, the Group members have, at all times, indicated their willingness to pay their fair share of the response costs at the Omega Chemical Superfund Site (the "Site"). We are, therefore, deeply disappointed that EPA ignored virtually all of the concerns we expressed about the fairness of EPA's *De Minimis* Settlement offer. We are particularly concerned that:

1. EPA has taken the position that because of the concept of joint and several liability, *de minimis* parties should be required to pay the costs to clean up significant contamination which EPA admits was caused by others at other sites.

2. EPA's demand for a 100% premium, in reliance upon a guidance document that is about than ten years old, is unreasonable and totally ignores the private insurance market which has developed over the past ten years which values the risk at about 10%.

3. EPA's "Option B" offer, which would require payment of a 50% premium, violates the same guidance document upon which EPA relied

LOEB&LOEB LLP

to demand the 100% premium. Moreover, it would require *de minimis* parties to pay a 50% premium for virtually no benefit.

In an attempt to resolve this matter quickly, and without the need to resort to litigation, the Group is making a settlement offer,[1] set out below, which, we believe, addresses many of the concerns set forth in EPA's letter, reduces the costs to the *de minimis* parties, and adequately protects EPA, the public and the environment against future environmental risks associated with the Omega site.

I. EPA Failed to Modify Its Cost Estimate Even Though Its Own Consultant Agreed that it was Flawed

We have many concerns about EPA's refusal to modify its cost estimate. We will only highlight a few here.

First, EPA's own contractor, CH2M Hill, agreed with our consultant, that there were other significant sources for the groundwater contamination. It specifically stated in its "Response to Comments by Levine-Fricke on Conceptual Remedial Action Cost Estimate for the Omega Chemical Superfund Site, Whittier, California" ("Response") that "[i]n addition to the Omega facility, multiple industrial facilities within the estimated extent of the plume are known or potential sources of contamination in groundwater" and that "some of the high VOC concentrations in groundwater appear to be associated with the potential sources." Thus, EPA's own consultant agrees that its cost estimate to clean up contamination associated with the Omega Site is greatly exaggerated because it includes costs to clean up sites that have nothing to do with the Omega Site. Nevertheless, EPA refused to take this into account. Instead, EPA asserts that the *de minimis* parties are jointly and severally liable for the entire problem. We find the notion that EPA would attempt to hold *de minimis* parties jointly and severally liable for millions of dollars in costs which are not even attributable to this site, appalling.

---

[1] The offer is contingent upon obtaining the final approval of each individual group member. Those that provide such approval will be referred to herein as the "Participating *De Minimis* Parties."

LOEB&LOEB LLP

Second, LFR noted that the cost estimate included costs to cleanup perchlorate and hexavalent chromium. LFR noted, however, that these chemicals do not appear to be associated with the Omega Site at all and, in any event, it is very unlikely that these chemicals would have to be cleaned up. EPA's consultant did not address the fact that these chemicals are not associated with the site. Nevertheless, it agreed that it was unlikely that the groundwater would have to be treated for these chemicals. Nevertheless, EPA failed to modify its cost estimate to take these critical facts into account.

Thus, EPA's own contractor agreed that there were significant problems with the cost estimate, yet EPA refused to modify the estimate.

II. EPA's Refusal to Reconsider the 100% Premium

As noted above, EPA effectively admits that its cost estimate is inflated because it includes costs to cleanup contamination which is not attributable to the Omega site and to cleanup chemicals that are not likely to need clean up. In addition, its contractor admitted that the cost estimate already contains a 15% contingency which "reflects the uncertainty in the assumptions used for the estimate." Nevertheless, EPA continues to demand that the *de minimis* parties pay a 100% premium over and above its admittedly inflated estimate. Thus, not only is EPA attempting to force *de minimis* parties to pay for contamination caused by others, but EPA is requiring that they pay double that amount. This is totally unreasonable.

The demand for a 100% premium is particularly unreasonable and inappropriate because we provided EPA with direct evidence, from the private insurance market, that the 100% premium it proposed to "address the level of risk transferred to other parties and EPA for all unknown conditions" did not reasonably reflect the degree of risk transfer. We demonstrated that the private market would only charge a premium in the range of 10% to handle these risks. EPA totally ignored this evidence. Instead, it stated that the 100% premium is "consistent with national guidance," (citing a guidance documents dated July 7, 1995 entitled "Standardizing the *De Minimis* Premium") and with "other *de minimis* settlements across the nation." The "guidance" upon which EPA relies was developed in the early 1990s, based on settlements entered into years before. Prior to 1995, Superfund was new and much

more uncertain and there was no market to accurately gauge the risks. Reliance upon this outdated guidance makes absolutely no economic sense.[2]

III. EPA's 50% Premium Offer

EPA did make an offer to settle for payment of a 50% premium. However, EPA's 50% premium offer violates the same guidance document upon which it relied to support the 100% premium. (Apparently guidance documents are the "law" if they support EPA's position, but are to be totally ignored when they do not). Under EPA's offer, there would be a re-opener if the cost estimate in the Final Record of Decision, or the costs incurred by January 1, 2013, exceed the current cost estimate. However, EPA's July 7, 1995 guidance document specifically states when the 50% premium is used, "the 'trigger' amount is purposely set high, so the settlement is only affected if the costs increase to a level significantly beyond what was anticipated at the time of settlement." Thus, EPA's guidance requires that the trigger for the re-opener be set significantly higher than the cost estimate, not at the cost estimate. If the trigger is going to be set at the cost estimate, the premium must either be reduced significantly or eliminated.

Not only are the premium and proposed re-opener inconsistent with EPA's own guidance document, but they are totally illogical. Under EPA's proposal, parties would be required to pay a 50% premium but the re-opener would be set at the cost estimate. Therefore, the parties would be required to pay their share of 150% of the costs up front, but would be required to again pay their share of the additional 50% if the cost estimate is exceeded. Moreover, they would not get any releases except for a release for their share of the cost estimate. (EPA's refusal to offer parties which accept this offer releases for natural resource damages and for costs incurred by the California

---

[2] EPA also asserted that the fact that 153 parties accepted the settlement offer demonstrated that it was "reasonable." It does not. EPA, in violation of the Freedom of Information Act and its own guidelines, failed to inform the *de minimis* parties that a group had been formed and failed to provide information to the group so that the *de minimis* parties could contact each other. As a result most of the parties who accepted the offer were not aware of any alternative and were not aware that they could control transaction costs by joining a group.

Department of Toxic Substances Control is purely punitive. These releases are not costing EPA anything, Therefore, there is simply no reason for withholding them from parties which accept this offer). Why would parties agree to pay a 50% premium when EPA can come back when the cost estimate is exceeded by any amount? The parties paying the premium would get virtually no benefit for the premium.

A settlement option with a reasonable premium and lower re-openers might be of some value if the parties could insure against the re-openers. However, one of the re-openers proposed by EPA would be triggered "if the cost estimate used in the Record of Decision ("ROD") to select the final remedy at the Site is greater than the existing Cost Estimate used for the *de minimis* settlement." Since a cost estimate, as opposed to dollars actually expended, is necessarily arbitrary, no insurance carrier would agree to insure against that risk. Therefore, EPA's Option B is not only unreasonable, it is uninsurable.

IV. Omega *De Minimis* Parties' Settlement Offer

For the reasons set forth above, the Omega *De Minimis* Group believes that EPA's offer is unreasonable. Nevertheless, the members of the Group recognize their potential obligations under CERCLA and are willing to pay their fair share of response costs pursuant to an agreed upon settlement. Therefore, the members of the Group make the following offer to EPA which is designed to address many of the concerns expressed by EPA in its letter.[3]

A. The *De Minimis* Parties who participate in this settlement (the "Participating *De Minimis* Parties") would create an entity called the Omega *De Minimis* Parties Trust (the "Trust"). All of the legal obligations of the Participating *De Mminimis* Parties relating to the hazardous substances allegedly disposed of at the

[3] Nothing in this letter constitutes an admission of liability regarding the Omega Site. This offer is made solely for purposes of attempting to resolve a contested claim.

Omega Site, including their liabilities under CERCLA, would be assumed by the Trust.[4]

B. Each Participating *De Minimis* party would deposit into the Trust a sum equal to its volumetric share of EPA's $89,200,000 cost estimate.[5] The Trust would agree to pay to EPA a sum equal to the volumetric share of the participating parties of all costs incurred by EPA (or by other PRPs pursuant to a Consent Decree of AOC entered into with EPA) through December 31, 2014, until the costs incurred reach $178,400,000 (twice EPA's future cost estimate).[6]

C. Each of the Participating *De Minimis* Parties would immediately pay EPA a sum equal to its volumetric share of the $12,300,000 in costs incurred to date.

D. EPA would provide the *De Minimis* Parties with full releases under RCRA and CERCLA as well as NRD releases and releases from the State of California.

We believe that this offer is fair and reasonable and addresses many of the concerns expressed by EPA.

1. Under the offer, the Participating *De Minimis* Parties would be guaranteeing payment to EPA of up to twice their volumetric share of EPA's cost

---

[4] As set forth below, the Trust would be required to make payments to EPA and to seek insurance coverage. This addresses EPA's concerns about who would seek payment under an insurance policy. Second, since the Trust would assume the liability of the parties, EPA could seek to enforce the payment obligation against the Trust under CERCLA or a settlement agreement. This addresses EPA's concern about converting a statutory obligation into a contractual obligation.

[5] We are somewhat confused as to the correct future cost figure. The "Conceptual Cost Estimate" prepared by CH2M Hill is $79,900,000. That figure was also used in EPA's February 12, 2004 presentation.

[6] The Trust's obligations would be secured with an insurance policy covering the potential future payments. Any remaining balance would be returned to the *de minimis* parties.

estimate. Thus, they would be guaranteeing EPA payment of a 100% premium if such fund are, in fact, required.

2. Under the offer, the responsibility for collecting from the insurance carriers would fall on the Trust, not EPA or any other parties;

3. Neither EPA nor the other parties would have to be involved in negotiating the terms of the policy. This would be handled solely by the Participating *De Minimis* Parties.

4. There would be no need for a re-opener. The Trust would be obligated to pay the funds as long as they are incurred by EPA or other parties.

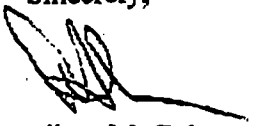
5. EPA would be able to pursue the Trust either contractually or through CERCLA since the Trust would assume the *de minimis* Parties' legal obligations.

Finally, we request that EPA extend the deadline for responding to its offer until at least September 30, 2004. This would provide additional time to discuss our offer. In addition, since EPA has yet to work out its arrangements with the Department of Interior and DTSC or to forward a draft Administrative Order or Consent Decree, it is impossible to fully understand EPA's pending offers.

LOEB&LOEB LLP

We would welcome the opportunity to meet with EPA at the earliest possible time to discuss our offer.

Sincerely,



Albert M. Cohen
of Loeb & Loeb LLP

AMC:dg
206031[illegible]0001
Trans_LA371715.1

cc: Thanne Cox, EPA
Lewis Modonado, EPA
Elizabeth Adams, EPA
Rep. David Dreier
Rep. Gary G. Miller
Rep. Christopher Cox
Rep. Howard Berman
Rep. Mike Thompson
Rep. William Thomas
Rep. Grace Napolitano
Rep. Lois Capps
Rep. Linda Sanchez
Sen. John S. Corizine
Sen. John McCain
Sen. Dianne Feinstein
Sen. Barbara Boxer